THE INQUISITORIAL FEATURE OF THE FEDERAL TRADE COMMISSION ACT VIOLATES THE FEDERAL CONSTITUTION.

THE Act of Congress creating the "Federal Trade Commission," which was approved September 26, 1914, provides for the appointment by the President of five commissioners at a salary of $10,000 per annum each, whose regular term of office shall be seven years. The object of the Act is to provide for federal regulation of all corporations engaged in interstate commerce, except banks and common carriers, which are already covered by federal regulatory laws. In the matter of preventing unfair methods of competition the jurisdiction of the Commission extends to persons and partnerships as well as corporations.

The more important powers specifically granted to the Commission are to prevent the use of unfair methods of competition in commerce; to compile information; to investigate from time to time the organization, business, conduct, practices and management of corporations and their relations to other corporations and persons; to require reports, special and annual; to make investigation of the manner of carrying out decrees in suits under the anti-trust acts; to make recommendations for the readjustment of the business of corporations alleged to be violating those acts; to make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; to make reports to Congress and to provide for the publication of its reports and its decisions; to classify corporations and to make rules and regulations for carrying out the purposes of the Act; and to investigate and report to Congress trade conditions in and with foreign countries where associations, combinations, or practices of manufacturers, merchants, or traders, or other conditions, may affect the foreign trade of the United States.

In order to accomplish these purposes the Commission is given

an inquisitorial power which is perhaps greater than has ever been attempted before in any statute, state or federal.

The opening paragraph of § 9 is as follows (italics in this and all subsequent quotations being ours):

> "That for the purposes of this act the commission, or its duly authorized agent or agents, shall at all reasonable times have *access to,* for the purpose of examination, and the right to copy *any documentary evidence* of any corporation being investigated or proceeded against; and the commission shall have power to require by subpœna the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpœnas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence."

"Documentary evidence" is defined in § 4 to mean *"all documents, papers and correspondence* in existence at and after the passage of this act."

In the quotation, *supra,* from § 9, it will be observed that two distinct methods of obtaining information are prescribed. The second method, by subpœna *duces tecum* from the court, though extreme and subject to abuse, may not be constitutionally objectionable. Furthermore, there is a judge at hand to decide whether a demand of the Commission is unreasonably comprehensive, or the documents in question relate to the matter under investigation, or the communications are privileged, or, for other reasons, are incompetent. Then, too, there is a witness on the stand who can explain the existence and meaning and setting of the writings under examination.

The first method, however, which, in giving to the Commission and its agents actual *access* to all papers and correspondence of a corporation, gives them a roving commission to wander at will through all its records and files, is not only unjust, unnecessary and un-American, but is distinctly violative of the Fourth Amendment to the Constitution of the United States, which forbids unreasonable searches and seizures.

In practice, under authority of this statute, an agent of the Commission, walking into the offices of the president or any other

official of a corporation, may demand free and unrestricted access to the files, including indices, covering not only routine business, but the most confidential correspondence, contracts, and other records, may examine them to his heart's content, and may take copies of all or any that he wishes. This is not an imaginary procedure. It is exactly what the examiners of the Interstate Commerce Commission do with the railroads of the country, except that the Act to Regulate Commerce does not give them access *to correspondence, and other general papers,* but only to certain prescribed accounts, records and memoranda, pertaining to the operation of the road and its accounting. Yet, even in this limited sphere, it is not unusual to see an agent of the Commission, with numerous clerks and typists, spend weeks in making examination of a carrier's records.

But what if this access is not granted? The act provides for the issuance of a mandamus by any district court of the United States; but a mandamus would rarely be necessary, as a corporation official would hardly dare resist in the face of the heavy fine and imprisonment which § 10 of the act thus provides as punishment for a refusal to submit to an examiner's demands:

> "Any person * * * who shall willfully refuse to submit to the commission or to any of its authorized agents, for the purpose of inspection and taking copies, any documentary evidence of such corporation in his possession or within his control, shall be deemed guilty of an offense against the United States, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than $1,000 nor more than $5,000, or to imprisonment for a term of not more than three years, or to both such fine and imprisonment."

While this paper is intended primarily to demonstrate that the provision of the statute is violative of the federal constitution, it is relevant, in order to show that the question is not merely academic, to note some of the reasons which will justify the corporations of the country in resisting the enforcement of this statute.

It is unjust because it exposes to outsiders a company's private business methods, trade secrets, and intimate correspondence. This may entail not only annoyance and humiliation, but great financial

loss. These examiners are not the commissioners, but merely their agents, who themselves employ a clerical force as sub-agents. Their discoveries (except what are technically known as "trade secrets" and lists of customers) the Commission may make public. It is true the examiners are forbidden, under penalty, to divulge information without authority from the Commission, but the greatest wrong could be done if an unscrupulous competitor of the company under investigation should corrupt one of these examiners—and we know that where large sums of money are involved men are corrupted. And if detected the punishment would not repair the damage.

Then the act itself permits an examiner to divulge the information upon order of the Commission, or when directed by a court, so that a party interested in having the information may bring a lawsuit, summon those examiners and get all the information they possess.

There is this other feature which necessarily involves a serious injustice. The examiner and his employees go through these private letters and other documents, take copies, spend weeks of investigation, reach conclusions which are necessarily one-sided, and embody them in reports to the Commission, without opportunity to the company to explain any transaction upon which they are reporting. Hence, for sheer lack of explanation, they may make a wholly false view of a particular transaction the basis of a report which will do great injury, not only to the company, but to its officials, before there is afforded any opportunity for explanation or refutation.

In other words, under this law the carrier may be condemned in the secret councils of the Commission without ever knowing the nature of the charge, much less having its "day in court" with opportunity to introduce its evidence and be heard in its own defense. The upshot of the matter will be a tendency to force corporations to abandon the present system of intelligently conducting business by definite, enduring writings and to transact it by word of mouth.

There is no necessity for this law, for, as shown in the quotation above, the act provides a definite, complete and legal method of getting every contract, letter, paper or other document that is

proper to be produced. Under § 9 the Commission can apply to the Federal Court for a subpœna *duces tecum* requiring any named witness to appear before it and bring all papers that may be asked for. This gives all needed opportunity for investigation, and yet lets an impartial judge, not an agent of the Commission, pass upon the question of relevancy. Then, too, when produced, a witness is at hand, as we have seen, to give such explanation as the company may have of the particular document under consideration.

This inquisitorial feature is also un-American. It would be difficult to imagine a statute more contrary to the genius of the institutions of this country. It lays bare to strangers and competitors not merely the impersonal record of the actual transactions of the company, but also the plans, hopes, fears, policies and opinions of its officials, and their correspondents, together with a great mass of private information as to men and things which a company necessarily receives and gives. Letters necessarily involve the personal privacy of individuals, and this right of privacy is a substantial one which the laws of this free country should, and, as we shall see, do protect. It is not a question as to the propriety of a corporation having secrets, for every man of experience knows that there are necessarily legitimate and important secrets in every business enterprise.

It will be observed that the act does not even exempt privileged communications between client and attorney—a privilege which goes back in England to the time "whereof the memory of man runneth not to the contrary," and which is the established law of every state in the Union. To strike it down, as is done in this act, is described as "despotic" by no less an authority than the Supreme Court of the United States, which, in discussing the doctrine in Connecticut Mutual Life Insurance Co. *v.* Schaeffer,[1] said:

> "The protection of confidential communications made to professional advisers is dictated by a wise and liberal policy. If a person can not consult his legal adviser without being liable to have the interview made public the next day by an

[1] 94 U. S. 457, 458.

examination enforced by the courts, the law would be little short of despotic. It would be a prohibition upon professional advice and assistance."

That Part of the Act Granting Access to Papers and Correspondence Is Unconstitutional.

It clearly violates the Fourth Amendment to the Constitution of the United States, which reads as follows:

"The right of the people to be secure in their persons, houses, *papers* and effects, *against unreasonable searches and seizures*, shall not be violated, and no warrants shall issue, but upon proper cause, supported by oath or affirmation, and *particularly describing* the place to be searched and the persons or things to be seized."

Even if this provision of the Constitution had never been construed by the courts it would none the less be obvious that Congress could not have provided for its violation more effectually than in the statute we are considering.

How could the search and seizure of a citizen's papers be accomplished more completely than by requiring him to give a stranger *physical access to them,* with leave to examine them at his leisure and take away copies of such as he wishes?

And if a search or seizure, could there be a more unreasonable one than this, which calls for, not particularly described papers (the Constitution's definition of a "reasonable" search), but "all documents, papers and correspondence?"

To establish our proposition it must be shown, first, that the *access to all papers* given by the bill is, in law and in fact, a search and seizure; second, that such search and seizure is an unreasonable one; and, third, that the Fourth Amendment applies to corporations.

The fact that the search and seizure is authorized by statute, or a court, or an administrative official, does not make it any the less within the inhibition of the constitution. Most cases in the books have arisen in connection with such acts done under color of authority. Here the Government itself sends its administrative agent into the citizen's private place of business, and takes possession of his private papers. The citizen protests,

but is forced into submission, not, indeed, by a physical club, but by an overhanging fine of from $1,000 to $5,000 and a possible penitentiary term of three years, for refusal. The agent, once admitted, may search without restriction "all documents, papers and correspondence" no matter how private and confidential. It seems unnecessary to take space to prove that this is a search and seizure. The word "access" means nothing less.

It is enough to show that the Supreme Court has gone much further and held that a search and seizure may be accomplished by even a *notice* in the nature of a subpœna *duces tecum.*

The leading case of Boyd *v.* United States [2] was a proceeding *in rem* to forfeit thirty-five cases of plate glass for an allege violation of the customs revenue laws. There was a federal statute which expressly authorized the Government's attorney to make a written motion in court for a notice to produce for inspection certain books, invoices and papers upon pain, in event of refusal, of having their alleged contents taken as confessed. When the validity of this statute came up to the Supreme Court, it was held to be a violation of the Fourth Amendment, because just as much a seizure as if there had been a quest. In discussing the question, whether what was done came within the search and seizure clause of the constitution, Justice Bradley said:

> "It is true that certain aggravating incidents of actual search and seizure, such as forcible entry into a man's house and searching among his papers, are wanting, and to this extent the proceeding under the Act of 1874 is a mitigation of that which was authorized by the former acts; but it accomplishes the substantial object of these acts enforcing from a party evidence against himself. It is our opinion, therefore, that *a compulsory production of a man's private papers* to establish a criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be; because it is a material ingredient, and effects the sole object and purpose of search and seizure."

Incidentally it was also suggested that the citizen was required to give testimony against himself, but that was a wholly

[2] 116 U. S 616.

different proposition, and does not affect the court's discussion of what constitutes a search and seizure.

In the course of its opinion, the court quoted from the memorable discussion by Lord Camden of the sacredness of private papers in the case of Entick *v.* Carrington:[3]

> "Papers are the owner's goods and chattels; they are his dearest property; and are so far from enduring a seizure that they will hardly bear an inspection; and though the eye can not by the laws of England be guilty of a trespass, yet where private papers are removed and carried away the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect."

Continuing, the Supreme Court said:

> "And any *compulsory discovery* by extorting the party's oath, or *compelling the production of his private books and papers,* to convict him of crime, or to forfeit his property, is *contrary to the principles of a free government.* It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it can not abide the pure atmosphere of political liberty and personal freedom."

A Commission created by Congress is, of course, as much subject to this constitutional provision as other federal agencies. This was declared in the case of Interstate Commerce Commission *v.* Brimson,[4] where the question involved was whether § 12 of the Act to Regulate Commerce, authorizing the Interstate Commerce Commission to invoke the court's assistance in obtaining evidence—like the provision of this Trades Commission Act authorizing the court to issue subpœnas *duces tecum*—was valid. It was held that the court could so be used, but in discussing the present questions the Supreme Court said:

> "In accomplishing the objects of a power granted to it, Congress may employ any one or all the modes that are appropriate to the end in view, taking care only that *no mode employed is inconsistent with the limitations of the Constitution.* We do not overlook these constitutional limitations,

[3] Reported at length in 19 Howell's St. Trials 1029.

[4] 154 U. S. 447.

which, for the protection of personal rights, must necessarily attend all investigations conducted under the authority of Congress. Neither branch of the legislative department, still less any merely administrative body [referring to the Interstate Commerce Commission] established by Congress, possesses, or can be invested with, a general power of making inquiry into the private affairs of the citizen." (P. 478.)

The court further said:

"We said in Boyd *v.* United States, 116 U. S. 616, 630—and it can not be too often repeated—that the principles that embody the essence of constitutional liberty and security *forbid all invasions on the part of the government and its employees of the sanctity of a man's home, and the privacies of his life.* As said by Mr. Justice Field in In re Pacific Railway Commission, 32 Fed. Rep. 241, 250: 'Of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness, than the right of personal security, and that involves, not merely protection of his person from assault, but exemption of his private affairs, books and *papers from the inspection and security of others. Without the enjoyment of this right, all others would lose half their value.*'" (P. 479.)

Again the court said:

"The inquiry whether a witness before the Commission is bound to answer a particular question propounded to him, or to produce books, papers, etc., in his possession and called for by that body, is one that can not be committed to a subordinate administrative or executive tribunal for final determination." (P. 485.)

And yet that is what is done if the grant of *access to all papers* is valid, for it is a final determination in advance that *every paper* is subject to inspection, the only limitation being the will of the agent who is browsing through the files.

The Boyd case establishes the proposition that a search and seizure may be accomplished without an actual quest and without force in taking possession. So much the more clearly is it a search and seizure when a representative of the Government is authorized to take physical possession of a company's docu-

ments, to read them, to copy them, and to take the copies away with him. And to do this, not pursuant to a search warrant particularly describing the place and papers, but pursuant to the authority of the statute giving him actual *access* to *all* of a company's papers, documents and letters, is *unreasonable,* if that word has any meaning.

That such a search is unreasonable, and that corporations are protected by the Fourth Amendment, are propositions fully established by the decision of the Supreme Court in the famous case of Hale *v.* Henkel.[5]

That was a grand-jury investigation, under the Anti-trust Act, against the American Tobacco Company and one of its subsidiary companies. Hale was put upon the stand and asked certain questions about the company's business, and was also ordered to produce certain papers. On page 45 will be found an enumeration of the papers the subpœna *duces tecum* required him to produce. They embraced, generally speaking, the agreements, contracts and correspondence with six named firms and corporations and all correspondence with thirteen other companies.

Hale refused to testify orally on the ground that his testimony would incriminate himself. To the demand for the papers he replied, first, that he did not have time to get them; next, that they would tend to incriminate the corporation and himself; and third that he could not lawfully be required to produce the documents asked. The court held that under the Immunity Act he could not rely on the claim of self-incrimination, and it was suggested that if he had pitched his defense solely on the ground that he had not sufficient time the court would have given him more time. So it came down to the third ground, that the demand was illegal. The court stated that it assumed he was relying on the Fourth Amendment to the Federal Constitution, and it proceeded to consider that question in order to determine whether or not the subpœna *duces tecum,* calling for these papers, was a search and seizure, whether or not it was an unreasonable one, and whether or not a corporation was entitled to the protection of the Fourth Amendment. After hold-

[5] 201 U. S. 43.

ing that a corporation, under some circumstances, could not claim immunity against *self-incriminating evidence* under the Fifth Amendment, the court definitely held that it *was entitled to the benefit of the Fourth Amendment,* saying:

> "4. Although, for the reasons above stated, we are of the opinion that an officer of a corporation which is charged with a violation of a statute of the State of its creation, or of an Act of Congress, passed in the exercise of its constitutional powers, can not refuse to produce the books and papers of such corporation, we do not wish to be understood as holding that a corporation is not entitled to immunity, under the 4th Amendment, against *unreasonable searches and seizures.* A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body it waives no constitutional immunities appropriate to such bodies. Its property can not be taken without compensation. It can only be proceeded against by due process of law, and is protected, under the 14th Amendment, against unlawful discrimination. Gulf, C. & S. F. R. Co. *v.* Ellis, 165 U. S. 150, 154, 41 L. Ed. 666, 667, 17 Sup. Ct. Rep. 255, and cases cited. Corporations are a necessary feature of modern business activity, and their aggregated capital has become the source of nearly all great enterprises." (P. 76.)

As to a subpœna *duces tecum* constituting a search and seizure, and a *corporation coming within the protection of the Fourth Amendment,* the court further said:

> "We are also of opinion that an order for the production of books and papers may constitute an unreasonable search and seizure within the Fourth Amendment. While a search ordinarily implies a quest by an officer of the law, and a seizure contemplates a forcible dispossession of the owner, still, as was held in the Boyd case, the substance of the offense is the compulsory production of private papers, whether under a search warrant or a subpœna *duces tecum,* against which the person, be he individual or CORPORATION, is entitled to protection." (P. 76.)

As the act we are considering provides for a plain search and seizure, and a corporation is entitled to protection against it, if unreasonable, the only question left is whether or not the ac-

cess granted by this bill to all correspondence, papers, documents and writings is or not a reasonable search and seizure. This proposition, hereinbefore partially discussed, is also determined by the decision in Hale *v.* Hankel,[6] where the Supreme Court said:

> "Applying the test of *reasonableness* to the present case, we think the subpœna *decum tecum* is *far too sweeping in its terms to be regarded as reasonable.* It does not require the production of a single contract, or of contracts with a particular corporation, or a limited number of documents, but all understandings, contracts, or correspondence between the MacAndrews & Forbes Company, and no less than six different companies, as well as all reports made and accounts rendered by such companies from the date of the organization of the MacAndrews & Forbes Company, as well as all letters received by that Company since its organization from more than a dozen different companies, situated in seven different States in the Union. * * * A general subpœna of this description is *equally indefensible as a search warrant would be if couched in similar terms.*" (P. 77.)

A reference to what was ordered in Hale *v.* Henkel will show that, broad as it was, it was incomparably narrower than the scope of the access here given to the Federal Trade Commission, which is bound by no specification of place or papers, and is without other limit upon its inquisitorial power. If the Supreme Court condemned that order, what will it say of the sweeping authority involved in the unlimited and all-inclusive language of this act?

Let it be understood that the court held that the Fifth Amendment, forbidding self-incriminatory evidence, did not apply to corporations (though Justice Brewer and the Chief Justice in a dissenting opinion held that it did), and accordingly it is not intended today to question the right of the Commission, under § 9 of the act, to ask *the court* to require the production of properly described private papers of a corporation. What is relied upon, however, is the court's holding that the *Fourth Amendment,* forbidding *unreasonable searches and seizures,* applies to corporations just as to individuals.

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[6] *Supra.*

At the conclusion of the opinion the court uses this language:

> "Of course, in view of the power of Congress over interstate commerce to which we have adverted, we do not wish to be understood as holding that an examination of the *books* of a corporation, if duly authorized by act of Congress, would constitute an unreasonable search and seizure within the Fourth Amendment." (P. 77.)

It is not clear what this means, but it refers only to *books*, and, in any event, cannot mean that Congress can authorize an examination which is *unreasonable* in character since Congress is bound equally with all others by the limitations of the Constitution.

The limitation against *unreasonable* searches is also recognized in Wilson *v.* United States,[7] where, in considering the status of the records of a corporation, the court, though holding that a corporation did not have the benefit of the Fifth Amendment (against self-incrimination), yet required the method of their production to be a reasonable one, saying:

> "They are not public records in the sense that they relate to public transactions, or, in the absence of particular requirements, are open to general inspection or must be kept or filed in a special manner. They have reference to business transacted for the benefit of the group of individuals whose association has the advantage of corporate organization. But the corporate form of business activity, with its chartered privileges, raises a distinction when the authority of government demands the examination of books. That demand, *expressed in lawful process,* confining its requirements *within the limits which reason imposes in the circumstances of the case,* the corporation has no privilege to refuse. It cannot resist production upon the ground of self-crimination." (P. 382.)

Similar questions were involved, and the Hale *v.* Henkel doctrine reiterated, in the very recent case of Weeks *v.* United States,[8] decided March 5, 1914.

Weeks was arrested upon the charge of violating the anti-lottery statute and the United States marshal went to his residence, was given the key by some one, entered his room, found

[7] 221 U. S. 361.

[8] 232 U. S. 391.

a lot of papers, and took them away. Upon his written demand to have them returned there arose the questions whether it was error in the court to refuse to restore them, and whether the court erred in admitting them as testimony. In discussing these questions, particularly in relation to federal agencies, the court said:

> "The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, *papers* and effects against all unreasonable searches and seizures under the guise of law. This protection reaches *all alike, whether accused of crime or not,* and the duty of giving to it force and effect is obligatory upon all entrusted under our federal system with the enforcement of the laws." (P. 392.)

In the same opinion the court indicates what is required. A search and seizure, to be permitted, must be upon proper warrant, which sets out with particularity a description of the papers wanted and the places to be searched. Considering the facts in the Weeks case the court said:

> "Under such circumstances, without sworn information and particular description, not even an order of court would have justified such procedure, much less was it within the authority of the United States marshal to thus invade the house and privacy of the accused. In Adams *v.* New York, 192 U. S. 585, this court said that the Fourth Amendment was intended to secure the citizen in person and property against unlawful invasion of the sanctity of his home by officers of the law acting under legislative or judicial sanction. This protection is equally extended *to the action of the Government and officers of the law acting under it.* To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protectection of the people against such unauthorized action." (P. 394.)

The court quotes from, and re-adopts the doctrine of, Hale *v.* Henkel, supra, saying:

"The Government also relies upon Hale *v.* Henkel, 201 U. S. 43, in which the previous cases of Boyd *v.* United States, *supra*; Adams *v.* New York, *supra;* Interstate Commerce Commission *v.* Brimson, 154 U. S. 447; and Interstate Commerce Commission *v.* Baird, 194 U. S. 25, are reviewed, and wherein it was held that a subpœna *duces tecum* requiring a corporation to produce all its contracts and correspondence with no less than six other companies, as well as all letters received by the corporation from thirteen other companies located in different parts of the United States, was an unreasonable search and seizure within the Fourth Amendment, and it was there stated that (201 U. S. 76) 'an order for the production of books and papers may constitute an unreasonable search and seizure within the Fourth Amendment. While a search ordinarily implies a quest by an officer of the law, and a seizure contemplates a forcible dispossession of the owner, still, as was held in the Boyd case, the substance of the offense is the compulsory production of private papers, whether under a search warrant or a subpœna *duces tecum,* against which the person, be he individual or *corporation,* is entitled to protection.'" (P. 397).

That opinion rendered in March of last year is the Supreme Court's last declaration upon the subject, and it but reaffirms the doctrine of the earlier cases.

In conclusion, it is enough to say that never in the history of any free country has there been enacted a law which attempts such a ruthless invasion of the privacy of papers. That it is a search and seizure of the most pronounced type is self-evident. That it is unreasonable is equally so. It is, then, a clear violation of the Fourth Amendment, if that constitutional provision applies to a corporation. The Supreme Court, in Hale *v.* Henkel,[9] holds that it does; and in no other case is there any contrary holding.

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[9] *Supra.*